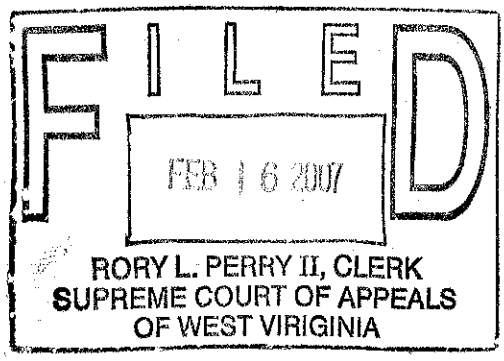
NO. 33188

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

DAVID NELSON,

Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal by David Nelson (hereinafter "Appellant") from the May 20, 2005, judgment of the Circuit Court of Mingo County (Thornsbury, J.), which sentenced him to a definite term of life without mercy in the State Penitentiary, upon his conviction by a jury of one count of first degree murder, in violation of West Virginia Code § 61-2-1; a definite term of life without mercy in the State Penitentiary, upon his conviction by a jury of one count of kidnapping, in violation of West Virginia Code § 61-2-14(a); an indefinite term of not less than fifteen years nor more than thirty-five years in the State Penitentiary, upon his conviction by a jury of one count of first degree sexual assault, in violation of West Virginia Code § 61-8B-3(a)(1)(i); an indefinite term of not less than one nor more than five years in the State Penitentiary, upon his conviction by a jury of one count of conspiracy to commit murder, in violation of West Virginia Code §§ 61-10-31 and

61-2-1; an indefinite term of not less than one nor more than five years in the State Penitentiary, upon his conviction by a jury of one count of conspiracy to commit kidnapping, in violation of West Virginia Code §§ 61-10-31 and 61-2-14(a); and an indefinite term of not less than one nor more than five years in the State Penitentiary, upon his conviction by a jury of one count of conspiracy to commit sexual assault, in violation of West Virginia Code §§ 61-10-31 and 61-8B-3(a)(1)(i); all sentences to be served consecutively. On appeal, Appellant claims that the circuit court committed error on numerous grounds, and denied Appellant a fair trial.

II.

STATEMENT OF FACTS

At some time during the late evening of Friday, August 30, 2002, and the early morning of Saturday, August 31, 2002, Wanda Lesher (hereinafter "the victim") was murdered. On September 1, 2002, her body was discovered by Senior Trooper J.W. Milum of the West Virginia State Police. He found the victim's dead body in a shallow grave in an area known as Messenger Hollow located in Dingess, Mingo County, after he received a dispatch. (Tr. 47-48, April 14, 2005.) When Trooper Milum found the victim, she was lying in a shallow creek area naked with the exception of a pair of socks. (*Id.* at 50.) The victim was covered with sticks and twigs in what appeared to be an attempt to bury her. The officer discovered that shoestrings were used to bind her arms behind her back and to perform a ligature strangulation about her neck. (*Id.* at 50-51.)

Trooper Milum received information on September 1, 2002, that Alfred Dingess had told many people that he participated in this murder. Mr. Dingess was later questioned and stated that he was involved with the murder and that it took place at Canterbury Cemetery. (*Id.* at 54.) At this time, Mr. Dingess also implicated Appellant's brother, Aaron Nelson, in the murder of the victim.

(*Id.*) Aaron Nelson was later questioned at his residence that evening. He was taken to a police car, and before he was asked any questions, he stated, "I didn't do anything to that girl." (*Id.* at 53.) The two men were then taken to the Southwestern Regional Jail where they were questioned further and then arrested for the victim's murder. (*Id.* at 54.)

Trooper Milum examined Canterbury Cemetery and found several bloodstains on the ground in an area that appeared to be disturbed by several individuals. (*Id.* at 56.) Later in the investigation, Officer Hugh Tomblin found a two-by-four in an area covered by weeds. (*Id.* at 60.) The victim's car was later found in Logan County completely destroyed by fire. (*Id.* at 57-59.)

Dr. Zia Sabet, Deputy Chief Medical Examiner for the State of West Virginia, conducted an autopsy on the victim. Dr. Sabet found that the victim suffered from multiple blunt force injuries. (*Id.* at 219.) He estimated that the victim was struck more than nine times on the head, and discovered that every bone in her skull was fractured due to this trauma. (*Id.* at 240.) Her upper and lower jaws were broken from being struck with a heavy object. (*Id.*) The victim was hit with such force by the two-by four with nails sticking out of it that her brain went to the front of her skull and caused fractures to these bones. Additionally, these fractures caused lacerations to this area of her face. On the left side of her head, her ear was missing as a result of the blows. (*Id.* at 250.) The impact of these blows by the two-by-four also caused what is known as "racoon eyes," where there are contusions at the bones above the eyes that cause bleeding around them. (*Id.* at 242.)

There was a visible pattern of injury on the victim's back which matched the instrument used to strike her. (*Id.*) The medical examiner also discovered that three ribs were broken due to the impact of the blows. (*Id.* at 243.) A bone at the roof of her tongue was broken due to the strangulation that occurred. (*Id.*) Dr. Sabet also found bruises on the right and left side of her body

as well as her chest. It was his estimation that the victim was struck with the two-by-four at least 19 times. (*Id.* at 244.) There were also abrasions found on her buttocks that were caused by her being dragged on the ground in a rough area. (*Id.* at 252.)

Fluid was found in the victim's stomach, lungs, frontal region, and inside the base of the skull. The examiner stated that the victim was unconscious due to injuries, but was alive at the time that she was thrown into the water. (*Id.* at 245.) Dr. Sabet stated that the victim died as a result of multiple blunt force injuries to the head, back, and anterior torso. The contributory factors were ligature strangulation and drowning. (*Id.* at 246.) The manner of death was homicide. (*Id.*)

Trooper Milum later received a telephone call from an individual stating that Zandell Bryant had told him that he was drinking a tremendous amount of alcohol and having trouble sleeping because he "kept hearing this lady screaming and begging for her life." (*Id.* at 81.) On November 13, 2003, Trooper Milum took Mr. Bryant into custody for questioning. After Zandell Bryant was read his *Miranda* rights, he confessed to being involved with the murder of the victim. He also stated that Alfred Dingess, as well as Appellant and his brothers Aaron and Clinty Nelson, took part in these crimes. (*Id.* at 61 and 90-91.) This statement eventually led to the arrest of Appellant. (*Id.* at 91.)

During the State's case-in-chief, Alfred Dingess testified that on the night of August 30, 2002, and the early morning of August 31, 2002, he, Zandell Bryant, Aaron Nelson, Clinty Nelson and Appellant were with the victim at Canterbury Cemetery. (*Id.* at 121-23.) According to Mr. Dingess, Aaron Nelson and the victim were arguing, and Aaron retrieved a two-by-four from a picnic table and hit her with it. After that, all five men started hitting the victim with the object. (*Id.* at 125-26.) Mr. Dingess witnessed Appellant strike the victim with the board approximately three

times. (*Id.* at 126.) Alfred Dingess also testified that he saw Appellant having sex with the victim on the trunk of her car. (*Id.* at 169-70.) He further testified that the victim was placed in the back of Appellant's truck, and that Appellant drove her to the site of the shallow grave. (*Id.* 129-30.) During the attempted burial of the victim at Messenger, Mr. Dingess observed that Appellant had blood on his jeans. (*Id.* at 174.)

Zandell Bryant testified that he walked up to the cemetery and saw Aaron Nelson with the victim. A little while later, David and Clinty Nelson came up to this area. He stated that the victim asked Aaron Nelson if she could go home to be with her kids. At this point an argument broke out between Aaron Nelson and the victim. (*Id.* at 184-85.) After the victim asked to go home and be with her kids, she was not permitted to do so, and all five men, including Appellant, had sexual intercourse with her. (*Id.* at 186-87.) More arguing ensued between the victim and Aaron Nelson, and the latter obtained the two-by-four from the picnic table. At this point, all five men, including Appellant, beat her with the two-by-four. (*Id.* at 199.) He stated that everyone hit the victim with the two-by-four at least once, and after this occurred she did not move and he knew that she was dead. (*Id.* at 191-92.) Mr. Bryant also testified that after this brutal beating took place, the victim was hauled in Appellant's truck, and Appellant drove her to the water area at Messenger where the attempt at a burial took place. (*Id.* at 190.)

On November 13, 2003, Appellant was arrested, transported to the Logan State Police headquarters and had his *Miranda* rights read to him. (R. at 71.) Early that next morning, Appellant gave a statement to Trooper First Class B.L. Keefer. (*Id.*) When asked about his whereabouts during the evening of August 30, 2002, and the early morning of August 31, 2002, Appellant replied, "I was working." (Tr. 221, April 14, 2005.) When Trooper Keefer went to verify this alibi at Appellant's

place of employment, he discovered that Appellant, in fact, was not working during that time period. (*Id.* at 222-24.) Appellant later testified at trial that he was watching his children while his wife was at work during this time. (Tr. 78-80, April 15, 2005.) Appellant's wife, Lynetta, testified at trial that her husband was at home taking care of their children while she was working on the evening and early morning in question. She stated that she talked to him at their home telephone as late as approximately 12:00 a.m. on August 31, 2002. (Tr. 281-82, April 14, 2005.) According to Appellant's daughter, Lakeisha, she, her sister, and Appellant went to sleep in their living room at approximately 11:00 p.m. on August 30, 2002. (*Id.* at 313.) Appellant's wife stated that Lakeisha made the telephone call for her father when she and Appellant spoke at 12:00 a.m.. (*Id.* at 283.) Yet, when asked at the trial about this, Lakeisha said that she did not recall making the telephone call and merely remembered waking up at approximately 7:00 or 8:00 a.m. on August 31. (*Id.* at 315.) Appellant's wife arrived home from work at approximately 7:15 a.m. on August 31, 2002. (*Id.* at 285.) At trial she testified that from approximately 1:30 a.m. until 7:15 a.m. on August 31, 2002, she had no telephone or personal contact with Appellant. (*Id.* at 293.)

At the conclusion of the trial, the jury handed down a guilty verdict against Appellant on all counts—first degree murder, kidnapping, first degree sexual assault, conspiracy to commit first degree murder, conspiracy to commit kidnapping and conspiracy to commit first degree sexual assault. (Tr. 282-83.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

A. The Court erred when it failed to conduct a hearing under Rule 404(b) of the West Virginia Rules of Evidence and permitted the State to use evidence concerning allegations that the Appellant had sexually abused his 13-year old sister in 1987.

State's Response:

The evidence elicited by the prosecution during cross-examination of Appellant was admissible under Rule 404(a)(1) of the West Virginia Rules of Evidence as character evidence used to rebut evidence of Appellant's good character offered by the defense, and no hearing was necessary. Therefore, no error was committed by the trial court.

B. The court erred when it violated Rule 801(d)(1)(B) of the West Virginia Rules of Evidence by permitting an out-of-court statement of a co-conspirator to be used against the Appellant when the declarant was available and testified at the trial.

State's Response:

Although the taped out-of-court statement by Zandell Bryant presented to the jury during the testimony of Trooper Milum was erroneously admitted under the statement against interest exception to the hearsay rule, its admission amounted to harmless error.

C. Reversible error was committed in this case as the assistant prosecuting attorney made improper remarks during opening statement.

State's Response:

The remarks in question made by the prosecutor during the State's opening statement did not amount to improper remarks warranting a reversal of Appellant's conviction, when applying the standard set by this Court in *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

IV.

ARGUMENT

A. NO ERROR WAS COMMITTED BY THE TRIAL COURT IN NOT CONDUCTING A RULE 404(b) HEARING WITH RESPECT TO THE EVIDENCE THAT APPELLANT ALLEGEDLY SEXUALLY ABUSED HIS SISTER FROM AGE THIRTEEN, BECAUSE IT WAS ACTUALLY REBUTTAL EVIDENCE ELICITED ON CROSS-EXAMINATION OF APPELLANT UNDER RULE 404(a)(1), IN RESPONSE TO CHARACTER TESTIMONY PRESENTED BY THE DEFENSE.

Appellant states that error was committed by the trial court because it failed to conduct a hearing under Rule 404(b) of the West Virginia Rules of Evidence when the prosecutor presented evidence on cross-examination that Appellant allegedly sexually abused his sister. However, this evidence was admitted under Rule 404(a)(1) as character evidence to rebut evidence of good character brought in by Appellant's defense counsel, and no hearing was required for such evidence. Thus, no error was committed, and Appellant was not denied a fair trial.

1. Standard of Review.

> (a) Character Evidence Generally.--Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of Accused.--Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution[.]

West Virginia Rules of Evidence Rule 404(a)(1).

2. **The Evidence Submitted by the Prosecution Was Character Evidence in Cross Examination Used to Rebut Evidence Presented of Appellant's Good Character Offered by Defense Counsel under Rule 404(a)(1) of the West Virginia Rules of Evidence, and No Hearing Was Necessary. Therefore, No Error Was Committed by the Trial Court.**

During cross-examination of Appellant, the prosecutor asked him about evidence of alleged sexual abuse by Appellant of his sister, Sheila Nelson, from the time that she was 13 years of age. (Tr. 107-10, April 15, 2005.) This was based on a report filed with a Child Protective Services worker in 1987 alleging that sexual abuse by Appellant against his sister occurred during the time period from approximately 1983 to 1984. (*Id.* at 108, 151.) Appellant characterizes this character evidence as that of other crimes, wrongs or acts as set forth under West Virginia Rule of Evidence 404(b). (*See* Appellant's Brief at 6-13.) In fact, the trial judge even mistakenly characterized this as admissible character evidence under Rule "404(B)." (Tr. 108, April 15, 2005.) Character evidence falling under the exception of Rule 404(b) is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of accident or mistake. Appellant correctly asserts that for such evidence to be admissible under the Rule 404(b) exceptions requires the prosecutor to provide proper notice to the defense upon request, and a hearing to determine its admissibility and potential prejudice.

However, this evidence was not offered by the State under any exception to Rule 404(b), but was actually offered for impeachment purposes as character evidence admissible under the exception of West Virginia Rule of Evidence 404(a)(1), submitted to rebut character evidence offered by the accused. (*See* Tr. 109, 152, April 15, 2005.) As made evident by the rule itself quoted above, such character evidence under the Rule 404(a)(1) exception does not require prior notice given to defense counsel as is the case for Rule 404(b) evidence.

The evidence of sexual abuse allegations against Appellant by his sister has been explained as that given to rebut good character evidence presented by Appellant that he was a "family man." (Tr. 37, April 14, 2005; Tr. 60, 152, 218; *See* Appellant's Brief at 7.) Yet, the true purpose of this character evidence was to rebut the "good character" evidence submitted by Appellant's defense counsel that he was not a rapist. (Tr. 93, April 15, 2005.) At trial, Appellant testified on his own behalf. Defense counsel presented a photograph of Appellant, his wife and two daughters, and represented to the jury that he was "a family man." (*Id.* at 60.) On direct examination, defense counsel then asked Appellant the following questions:

Q: Okay. Now the State of West Virginia says you are a cold blooded killer. Do you understand that's what they are saying?

A: Yes, sir.

Q: Are you a cold blooded killer?

A: No.

Q: Are you a kidnapper?

A: No.

Q: How about sexual assault?

A: No.

Q: Do you understand that that means forcible rape?

A: Yes, sir.

(*Id.* at 60-61.) Later during the direct examination, the following questioning took place between Appellant and his defense counsel:

Q: Did you know it's a bad inference on you of the fact that this act or whatever it was involves, this crime involves a female? What you have just described, do you have something against females?

A: No.

Q: Do you dislike females?

A: No.

Q: Do you dislike women in general?

A: I love my wife.

Q: Like to beat them?

A: No.

Q: Rape them?

A: No.

(*Id.* at 93.)

Clearly, the evidence of allegations of sexual abuse by Appellant committed against his sister was meant to rebut the "good character" evidence presented by defense counsel during his direct examination that he had the "good character" of not being prone to sexual abuse, treating females badly or raping them, as is permitted without any hearing or prior notice by West Virginia Rule of Evidence 404(a)(1). Conversely, this character evidence submitted by the prosecutor was not meant to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of accident or mistake, as set forth in Rule 404(b) that does require such prior notice. Thus, no hearing was required under this exception to Rule 404(a) disallowing the admission of character evidence.

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis,* 204

W. Va. 58, 511 S.E.2d 469 (1998); Syl. Pt. 1, *State v. Martisko,* 211 W. Va. 387, 566 S.E.2d 274 (2002); Syl. Pt. 3, *State v. Brooks*, 214 W. Va. 562, 591 S.E.2d 120 (2003); *see also* Syl. Pt. 1, *State v. Phelps*, 197 W. Va. 713, 478 S.E.2d 563 (1996) ("'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983)). With respect to the character evidence of the allegations of sexual abuse by Appellant against his sister, there was absolutely no abuse of discretion on the part of the trial court. The evidence was clearly brought in due to Appellant's opening the door by presenting "good character" evidence that he was not one prone to rape or treating women badly. (Tr. 93, April 15, 2005.)

A bench conference was conducted on this matter on two separate occasions. (*Id.* at 107-08 and 151-52.) The first bench conference occurred during the cross-examination of Appellant. (*Id.* at 107-08.) At this conference, the prosecutor gave Appellant's defense counsel an opportunity to examine the Child Protective Services Report, and the judge determined that the evidence was based on the same and was given as rebuttal. (*Id.*) The trial judge stated that Appellant could deny the evidence during this cross-examination. (*Id.*) In light of this determination, the trial judge allowed the evidence to be submitted. The second conference took place when Appellant's defense counsel objected to the testimony of Janet Walker, an employee of Tug Valley Recovery Center, the women's shelter that Appellant's wife stayed for a period of time. (*Id.* at 151-52.) Appellant's defense counsel raised a motion for mistrial on the basis that the character evidence was prejudicial and lacked relevance and that he did not receive adequate notice of it. (*Id.*) The trial judge again stated that this was properly brought in under Rule 404 on cross-examination as rebuttal character evidence because Appellant opened the door and was indeed relevant. (*Id.* at 152.) In light of this,

the trial judge overruled the motion. So the trial court conducted two separate examinations of this evidence and performed an adequate balancing test when it allowed its admission. A separate hearing was not required under Rule 404(a)(1), and no abuse of discretion occurred. Thus, Appellant was not denied a fair trial.

B. ALTHOUGH THE TAPED OUT-OF-COURT STATEMENT OF ZANDELL BRYANT IMPLICATING APPELLANT IN THESE OFFENSES WAS NOT PROPERLY ADMITTED UNDER THE HEARSAY EXCEPTION FOR AN ADMISSION AGAINST INTEREST, ITS ADMISSION AMOUNTED TO HARMLESS ERROR AND DOES NOT WARRANT A REVERSAL.

Appellant asserts that the trial court erred in its admission of the taped out-of-court statement by Zandell Bryant during the testimony of Senior Trooper J.W. Milum stating that Appellant was a co-conspirator in the offenses charged against him in this case. Although the admission of this statement appears to be an improper application of the declaration against penal interest exception to the hearsay rule, it is harmless error, and Appellant's constitutional rights were not violated. Therefore, the decision of the trial court should not be reversed on the basis of its admission.

1. <u>The Standard of Review</u>.

> Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. Pt. 4, *State v. Rahman*, 199 W. Va. 144, 483 S.E.2d 273 (1996).

2. **Although the Taped Out-of-court Statement by Zandell Bryant Presented to the Jury During the Testimony of Trooper Milum Was Erroneously Admitted under the Statement Against Interest Exception to the Hearsay Rule, its Admission Amounted to Harmless Error.**

During the State's case-in-chief, the prosecution attempted to bring in the tape-recorded statement of Zandell Bryant stating that Appellant was involved in the murder, kidnapping, and rape of Wanda Lesher. This occurred during the testimony of West Virginia State Police Trooper J.W. Milum. (Tr. 104-107, April 14, 2005.) Appellant did make a proper objection to this being admitted as evidence on hearsay grounds. (*Id.*) The prosecution justified this statement being admitted on redirect examination of Trooper Milum due to Appellant's bringing out the statement of Alfred Dingess on cross examination of the officer, where his defense counsel attempted to establish inconsistencies. (*Id.* at 93-97, 108.) The judge overruled Appellant's objection to admitting the taped statement of Mr. Bryant, and it was played for the jury. (*Id.* at 107-09.)

The trial court admitted this taped statement under the statement against penal interest exception to the hearsay rule because at the time it was made, it did implicate Mr. Bryant in these crimes as well as Appellant. The State concedes that this was an improper admission of this tape-recorded statement as a statement against interest in that West Virginia Rule of Evidence 804(b)(3) only allows for such admissions when the declarant is unavailable to testify. Zandell Bryant took the stand to testify in the State's case-in-chief that same day. (*Id.* at 183.) However, the admission of this evidence amounts to mere harmless error. In applying the standard set in *Rahman, supra*, there is no doubt that if this tape-recorded statement were taken out of the case, the evidence is sufficient to convict Appellant of these offenses.

Alfred Dingess testified that Appellant was at the scene of the crime with him and the latter hit the victim with the two-by-four in question about three times. (*Id.* at 127.) Mr. Dingess also testified that Appellant used his truck to transport the victim where they buried her in the shallow grave. (*Id.* at 129.) When asked if Appellant was involved with him and the other co-conspirators in the victim's murder, Mr. Dingess replied, "Yeah, he was." (*Id.* at 133.) Additionally, Mr. Dingess testified that he saw the victim's blood on Appellant's jeans. Further, he witnessed Appellant having sex with the victim. (*Id.* at 174, 169 and 175.)

After Mr. Dingess' testimony, Zandell Bryant took the stand in the State's case-in-chief and stated that Appellant was with him and the other co-conspirators at Canterbury Cemetery when these offenses occurred. (*Id.* at 184-86.) He stated that the victim told them that she wanted to go home and be with her kids, yet they did not let her go, and all of them had sex with her, including Appellant. (*Id.* at 185-86.) Mr. Bryant then said that after this occurred, they all started hitting the victim with the two-by-four. (*Id.* at 188.) Like Mr. Dingess, Mr. Bryant also testified that Appellant drove his truck with the victim's body in it where she was placed in the hole of water in Messenger. He testified that Appellant was involved in this attempt to hide the victim's body. (*Id.* at 189-92.)

Trooper Milum testified that he had probable cause to arrest Appellant. (*Id.* at 83.) The prosecution also presented testimony in its case-in-chief of Trooper First Class B.L. Keefer of the West Virginia State Police. (*Id.* at 220.) Trooper Keefer testified that Appellant gave a statement to him regarding his whereabouts on August 30, 2002. Appellant stated that he was at work that night. (*Id.* at 221.) Yet when the officer attempted to verify that Appellant was indeed working that

night at a coal mining conveyor belt operation in Chapmanville, he discovered that Appellant was not present that night according to the time sheet. (*Id.* at 222-24.)[1]

In examining all of the testimony given in the State's case-in-chief, it is evident that there was indeed more than enough evidence to convict Appellant of these offenses when the taped testimony of Zandell Bryant, played for the jury during the redirect examination of Trooper Milum, is removed. Accordingly, the verdict in this case survives the *Rahman* test, and the mistake of characterizing this out-of-court statement as a statement against interest exception to the hearsay rule according to West Virginia Rule of Evidence 804(b)(3) amounts to harmless error.

The final test in determining if the evidentiary error is reversible or harmless in accordance with *Rahman, supra,* is to determine whether it is prejudicial in nature. This statement by Mr. Bryant in no way had a prejudicial effect on the jury. It was not meant to inflame the jurors, but was merely a statement by a co-conspirator. Mr. Bryant later made the same statement when he testified in court. Additionally, it was consistent with the testimony of Mr. Dingess before him. These are merely statements made by others involved in these crimes and had no prejudicial effect on the jury.

Appellant argues that by playing this taped statement by Mr. Bryant to the jury, it violated his right to confront witnesses pursuant to the Confrontation Clauses of the Sixth Amendment to the United States Constitution, and Article III, Section 14 of the West Virginia Constitution. (*See* Appellant's Brief at 16-17.) However, this is a dubious argument since the prosecution called Mr. Bryant as a witness in its case-in-chief. Thus, Appellant's defense counsel had ample opportunity to confront this witness. Zandell Bryant was the second witness to testify after Trooper Milum.

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[1]On direct examination Appellant testified that he was, in fact, at home the entire evening of August 30, 2002 and the morning of August 31, 2002, taking care of his daughters while his wife was at work. (Tr. 79-81, April 15, 2005.)

Appellant had the opportunity to question Mr. Bryant regarding his police statement in both cross-examination and re-cross examination. In fact, Appellant's defense counsel cross-examined Mr. Bryant extensively concerning his statement and his testimony as to what happened on the evening of August 30, 2002, and the early morning of August 31, 2002. (*Id.* at 193-214.) In light of this, there was no violation of Appellant's constitutional right to confront witnesses.

C. THE COMMENTS IN QUESTION MADE BY THE PROSECUTOR DID NOT RISE TO THE LEVEL TO BE CONSIDERED IMPROPER WARRANTING A REVERSAL OF APPELLANT'S CONVICTION.

Appellant contends that the prosecutor made various improper remarks during the State's opening statement that had such an overwhelming effect on the jury's understanding of justice that his conviction should be reversed. However, these remarks were not of such character as to prejudice the jury and warrant a reversal.

1. The Standard of Review.

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

2. The Remarks in Question Made by the Prosecutor During the State's Opening Statement Did Not Amount to Improper Remarks Warranting a Reversal of Appellant's Conviction When Applying the Standard Set Forth in *Sugg, Supra.*

Appellant cites various remarks made against him in the State's opening statement relating to the testimony of Alfred Dingess. (*See* Appellant's Brief at 17-18; Tr. 28-29, April 14, 2005.)

However, when these remarks are looked at using the *Sugg* standard, it is apparent that they did not amount to improper statements that would warrant a reversal of Appellant's conviction. The prosecutor did make reference to Mr. Dingess, Aaron Nelson and Zandell Bryant being convicted or pleading guilty to the offenses charged against Appellant in prior cases. (Tr. 28-29, April 14, 2005.) When Appellant's defense counsel moved for a mistrial, the trial judge told the prosecutor to refer to testimony that would be presented in the instant case or that he thought would be brought out in the trial rather than testimony regarding past convictions of others, and then denied the motion. (*Id.* at 29-31.) The trial judge then instructed the jury to disregard remarks made in this opening statement referring to testimony in a previous court proceeding. (*Id.* at 31-32.) The prosecutor then made the correction and refrained from referring to testimony in past court proceedings and the convictions of others. (*Id.* at 32-34.)

The remarks did not have the tendency to mislead or prejudice the jury. They were merely speaking to the circumstances surrounding the offenses charged against Appellant and that a co-conspirator, Alfred Dingess, was going to testify against him. The prosecutor was expressing to the jury in this opening statement that there were various co-conspirators involved with Appellant and that they were going to testify that he was with them and was as guilty of the crimes as they were. After the judge admonished the prosecutor to speak only about testimony he planned to present in the case at bar, the prosecutor made the correction and so stated that Appellant was with the co-conspirators on the night in question and participated with them in the offenses charged. (*Id.* at 33-34.) Thus, these remarks were isolated rather than extensive when applying the second factor of the *Sugg* holding. Appellant even admits that the remarks made in the prosecution's opening statement were isolated. (*See* Appellant's Brief at 19.) Clearly, there was sufficient evidence to

convict Appellant of these charges apart from these remarks so that the third *Sugg* factor is satisfied. As stated previously, Alfred Dingess and Zandell Bryant did testify that Appellant was guilty of these offenses. Trooper Milum testified that he had probable cause to arrest Appellant upon conducting an investigation, and Trooper Keefer stated that Appellant gave him a false alibi with respect to his whereabouts for the time period in question. Finally, the remarks were not deliberately made to divert the jury's attention to extraneous matters. Thus, the fourth *Sugg* factor is satisfied. Appellant states that he is unable to answer the question as to whether the remarks were deliberately placed before the jury, but merely states that improper statements were made in supporting this claim. (*See* Appellant's Brief at 19.) So, as established above, once the judge gave the warning to the prosecutor and instructed the jury to disregard the remarks, the prosecution corrected the matter in the remainder of the opening statement and proceeded to present ample evidence to convict Appellant in its case-in-chief.

The Court in *Sugg* further held. "A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which clearly do not prejudice the accused or result in manifest injustice." *Id.*, Syl. Pt. 5. With all of the testimony discussed above and the physical evidence presented, as well as the isolated nature of these remarks and the cautionary instruction given to the jury at the time the remarks were made, they in no way prejudiced Appellant nor resulted in manifest injustice.

Appellant contends that the prosecutor's remarks amount to his playing the role of a "partisan eager to convict" and that the verdict should be reversed because they were meant to mislead the jurors by asking them "to determine guilt or innocence based on the criminal conduct of others." (*See* Appellant's Brief at 20.) Yet these remarks do not amount to the prosecutor being such a

"partisan eager to convict." Regarding partisan prosecutorial practices, this Court has held, "It is improper for a prosecutor in this State to assert his personal opinion as to the guilt or innocence of the accused." Syl. Pt. 1, *State v. Moss*, 180 W. Va. 363, 376 S.E.2d 569 (1988). In that case, this Court reversed a conviction where the trial court failed to intervene when the prosecutor played a partisan role in the closing arguments and injected such statements of personal opinion as characterizing the Appellant as a "psychopath" with a "diseased criminal mind." The prosecutor then went on to urge the jury to hand down a verdict of guilty of first degree murder without recommendation of mercy so that he would "never be released to slaughter women and children of Kanawha County." (*Id.* at 368, 376 S.E.2d at 574.) The remarks made in the present case in no way rise to the level of those in *Moss* to be characterized as a "partisan eager to convict." Moreover, the trial judge corrected the remarks made by the prosecutor when they were relating to testimony in prior proceedings and the convictions of others. Accordingly, these remarks do not rise to the level to warrant a reversal of Appellant's conviction.

V.

CONCLUSION

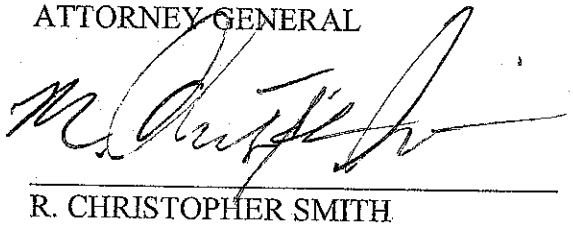
For the foregoing reasons, the judgment of the Circuit Court of Mingo County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 16th day of February, 2007, addressed as follows:

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